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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. A-515

JOHN D. SCHROEDER,
Appellant,

v.

THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,
Appellee.

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

ON APPEAL FROM THE
COURT OF APPEAL, SECOND APPELLATE DISTRICT
OF THE STATE OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED IN SUPPORT OF JURISDICTIONAL STATEMENT

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LEAGUE, INCORPORATED
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BRIEF AMICUS CURIAE OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED IN SUPPORT OF JURISDICTIONAL STATEMENT

The American Radio Relay League, Incorporated (hereinafter the League), pursuant to Rule 42 of this Court and with the consent of the parties, respectfully submits a brief *amicus curiae* in support of the jurisdictional statement of appellant.

INTEREST OF AMICUS CURIAE

The League is the nationwide non-profit organization of amateur radio operators of the United States and Canada, with 130,000 amateurs in the United States licensed by the

Federal Communications Commission and 5,400 amateurs in Canada licensed by the Department of Communications as full voting members. The purposes of the League, as stated in its Articles of Association, include the following:

> . . . . the promotion of interest in amateur radio communication and experimentation; the relaying of messages without charge; the furtherance of the public welfare; the advancement of the radio art; the fostering and promotion of intercommunication by electronic means for the benefit of the members and without pecuniary gain; [and] the fostering of education in the field of electronic communications. . . .

The League's headquarters office is in Newington, Connecticut.

PRELIMINARY STATEMENT

The Amateur Radio Service in the United States operates under rules and regulations of the Federal Communications Commission (hereinafter the Commission or FCC), pursuant to Article 41 of the Radio Regulations of the International Telecommunication Union (Geneva 1959), to which the United States is a signatory, and the Communications Act of 1934, as amended, 47 USC §151 *et seq.*

There were 345,223 licensed amateur stations in the United States at the end of 1977, most of which are authorized to operate in six frequency bands below 30 MegaHertz (MHz).[1] In addition, more than 11,000,000 Citizens Band (CB) stations[2] are licensed by the FCC to

[1]FCC News Release of February 23, 1978, No. 97362.

[2]*Budget Estimates, Fiscal Year 1979, Federal Communications Commission.*

operate in a single frequency band centered at 27 MHz.[3] For administrative purposes, the FCC has placed both the Amateur Radio Service and the CB Radio Service under the Personal Radio Division, Safety and Special Radio Services Bureau.

An antenna is a necessary part of every transmitting station; without it power cannot be radiated and communications cannot be conducted. Particularly on the frequencies employed by amateur and CB stations, an outdoor antenna is essential. Two general rules relating to antennas are (1) the size of the antenna varies inversely with the operating frequency, and (2) the range and reliability of communication increases as the height of the antenna above ground increases.

Efforts of municipalities to regulate the installation and operation of amateur radio stations by enactment and enforcement of zoning regulations have been generally unsuccessful. The highest courts of a number of states, including Minnesota, New Jersey, Pennsylvania and Arizona, have held that installation and operation of amateur radio stations and their antennas are incidental or accessory uses of residential property which cannot be limited by zoning ordinances.[4] The precedents established in those states have been followed by the lower courts of several other states, including Ohio, Maryland and Texas.[5] Only in New

[3]There are more than 25,000,000 CB transceivers (combination transmitters and receivers) in the hands of the public according to the FCC. All members of a single family, even the children, may operate a CB station under a single license, and one license may cover more than one transceiver. 47 CFR§95.465(b)(2). Thus, it appears that as many as 50,000,000 persons may be engaging in CB operations in the United States.

[4]*Village of St. Louis Park v. Casey,* 218 Minn. 394, 16 N.W.2d 459 (1944); *Appeal of Lord,* 368 Pa. 121, 81 A.2d 533 (1951); *Wright v. Vogt,* 7 N.J. 1, 80 A.2d 108 (1951); *Town of Paradise Valley v. Lindberg,* 27 Ariz. App. 70,551 P.2d 60 (1976).

[5]*Dettmar v. County Board of Zoning Appeals,* 28 Ohio Misc. 35, 273 N.E. 2d 921 (1971); *Zoning Board v. Marshall,* 387 S.W. 2d 60 (1975).

York has the highest court held that the installation of an antenna of an amateur radio station is an impermissible use of residential property.[6] The only state to follow New York has been Washington.[7]

ARGUMENT

I. A PREVAILING FEDERAL RULE IS NECESSARY TO PREVENT A MULTIPLICITY OF CASES AND CONFLICTING OPINIONS.

Interference to reception has been a problem since the earliest days of radio, and became even more of a problem with the widespread use of television and high-fidelity sound systems in the home following World War II. Amateur stations were involved in a high percentage of the complaints of interference in the early television days because the stations were located in nearby residences. Fortunately, however, the total number of complaints was relatively small because the amateur stations were scattered and some distance from most homes. Almost all of the interference problems were solved by the cooperative efforts of the amateurs, local service technicians, and the receiver owners, by implementing relatively simple procedures developed by the League and television receiver manufacturers.

The explosive growth of the CB service in the last three years has generated a corresponding increase in the number of complaints, usually to television reception, but at times to hi-fi systems, AM radio, public address systems, electronic organs, and other home-entertainment devices.

[6] *Presnell v. Leslie*, 3 N.Y. 2d 384, 165 N.Y.S. 2d 488, 144 N.E. 2d 381 (1957).

[7] *State ex rel. Carpenter v. City of Everett Board of Adjustment*, 7 Wash. App. 930, 503 P.2d 1141 (1972).

Most CB operators have been unable to eliminate the interference because, unlike amateur operators, they have not received training on radio theory and good technical practice.[8]

Often in frustration the neighbors demand that their governmental officials take some action to eliminate the interference. In response, many city councils and their counterparts have adopted, as part of zoning ordinances, severe restrictions in the size and height of outdoor antennas, apparently not realizing that the FCC has the expertise and authority to take corrective action.[9] A few ordinances have prohibited all antennas.[10]

The League receives an average of fifteen to twenty calls and letters a week concerning attempts by local authorities to restrict or prohibit amateur radio operation by adoption or enforcement of zoning ordinances. Litigation involving the lawfulness of zoning ordinances and building codes

[8] Every amateur radio operator, after rather intensive study, has passed an FCC examination on radio theory. A CB license is issued to anyone 18 years or older who completes and files with the FCC a simple form listing his name and address.

[9] Local legislators have failed to recognize or understand that the possibility of interference to television receivers and other electronic devices in nearby homes decreases as the height of the antenna above ground increases. Some legislators introduced ordinances to prohibit the operation of amateur and CB stations when interference was encountered even though the cause of the interference in at least forty-five percent of the cases involved poor design of the television receivers. *Industrial Communications, October 8, 1977*, p. 16.

[10] An ordinance prohibiting all antennas, even indoor, without a special use permit has been enacted by the City of Northglenn, Colorado. The prohibition even applies to all forms of television antennas, even the widely used "rabbit ears". An appeal is awaiting the decision of the Supreme Court of Colorado; ***Baysinger, et al. v. City of Northglenn***, Supreme Court of Colorado, No. 27477.

when applied to amateur stations and their absolutely necessary antennas is pending in almost every state.[11] Only a small percentage of zoning board decisions adverse to amateurs reach the courts, largely, the League is informed, because an appeal is costly.[12] Nevertheless, the number of cases on appeal is increasing each month.

In an attempt to bring about uniformity in at least one state, a Vermont senator has introduced a bill which would prohibit municipalities from regulating "federally licensed Amateur Radio Service antennas and their supporting materials" unless the municipality's legislative body reasonably finds that the installation presents a safety hazard to life or property.[13]

A ruling by this Court will serve to put local authorities on notice that operation of amateur radio stations is a federal matter over which the federal government, by and through the enactment of the Communications Act of 1934, has preempted jurisdiction, and that local ordinances which restrict the effective operation of amateur radio stations violate the supremacy clause, Article VI, Section 2, of the Constitution of the United States.

[11]The Personal Communications Foundation, a non-profit tax-exempt California organization established in 1976 for the purpose of creating a comprehensive collection of court decisions, briefs and legal memoranda for use by attorneys engaged in amateur radio and CB litigation, has estimated that, in 1976, there were more than 7,000 legal matters involving all aspects of non-profit personal communications (amateur and CB), as compared to only 200 in 1956.

[12]Many are teenagers and students with limited resources when they become radio amateurs.

[13]Vermont Senate Bill 233 introduced by Senator Doyle, Washington County.

II. THE RADIO LICENSING FUNCTION OF THE FEDERAL GOVERNMENT HAS BEEN INVADED BY LOCAL ORDINANCES REQUIRING APPLICATIONS ACCOMPANIED BY FEES AND EXTENSIVE HEARING PROCEDURES.

Zoning Ordinances usually provide for the filing of applications for variances, special use permits, or other waivers, followed by a hearing before the city council, zoning board or other official or body. An increasing number of ordinances require the payment of more than a nominal fee with the application. A high percentage of the ordinances provide no guide lines, standards or other criteria to assist an applicant in submitting material, to guide the official or board in reaching a decision, and to aid a reviewing court in reaching a determination as to whether the action was arbitrary or capricious. The procedures often are so complex to a layman that the services of an attorney are necessary for the applicant to have a reasonable chance of success. Costs of several hundreds of dollars are not unusual.

For a radio amateur, who is interested in radio as a hobby and without pecuniary interest,[14] such costs and procedures are or may be an unreasonable burden. As long ago as 1927, a local ordinance imposing a license requirement upon radio stations was held to be invalid. *Whitehurst v. Grimes*, (D.C. Ky. 1927) 21 F.2d 787. See also *Allen B. DuMont Laboratories v. Carroll*, (E.D. Penna. 1949) 86 F. Supp. 813, affirmed 184 F.2d 153, *certiorari denied*, 340 U.S. 929 (1949).

The use of zoning ordinances and hearings on applications for variances, special use permits, and other

[14]Section 3(q) of the Communications Act of 1934, as amended, 47 USC §153(q), defines an Amateur Station as "a radio station operated by a duly authorized person interested in radio techniques solely with a personal aim and without pecuniary interest."

waivers to regulate, restrict and sometimes effectively prevent the establishment and operation of amateur radio stations is a relatively recent development. As shown in the preliminary statement, the first reported attempt was in 1944. *Village of St. Louis Park v. Casey, supra.*

Assumption of authority by a city council or zoning board to regulate the height, size, configuration or location of the antennas of amateur (or CB) radio stations carries with it the authority to reduce the antennas to a size that they become unusable,[16] or indeed to ban them altogether. Such restrictions silence or restrict amateur and CB operators just as effectively as would local legislation canceling or modifying licenses issued by the FCC. As surely as the power to tax is the power to destroy, the power to regulate antennas is the power to invalidate authority granted pursuant to the Communications Act of 1934.[17]

An opinion by the Supreme Court of the United States holding that the use of zoning ordinances and related hearings in a manner which effectively reduces the communications capability of an amateur radio station is an invasion of the licensing function of the Federal Government is necessary to limit zoning ordinances to the proper and permissible application of the police power of the municipality.

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[16]In *The People of the State of New York v. Klein*, Village Court, Incorporated Village of Mimsey Park, Nassau County, an amateur radio operator, who had been issued a building permit to erect a tower, was found guilty of violating a zoning ordinance which limited the width of an antenna to six feet. Sentence, consisting of a fine, was imposed February 9, 1978. An appeal is contemplated.

[17]The League does not take issue with the authority of local councils, zoning boards, etc., to regulate where commercial use might occur or where serious concerns of the safety of life and property are involved, but this is not the situation in the majority of antenna restriction cases nor in the case at bench. *Kroeger v. Stahl*, (3rd Cir. 1957) 248 F.2d 121, often relied upon by municipalities, involved an attempted commercial use of residential property.

III. NATIONAL UNIFORMITY ON FEDERAL PREEMPTION IN CASES OF INTERFERENCE IS NECESSARY.

The California Court of Appeal correctly held in the instant case:[18]

> Unquestionably, federal legislation has preempted local regulation of radio transmission, including assignment of frequencies, *interference phenomena*, and the control of broadcast material. (See, *e.g., Allen B. DuMont Laboratories, Inc. v. Carrol* (E.D. Penna. 1949) 86 F. Supp. 813, aff'd 184 F.2d 153, cert denied 840 U.S. 929, 71 S. Ct. 490, 95 L. Ed. 670; *United States v. Southwestern Cable Co.* (1968) 392 U.S. 157, 88 S. Ct. 1994, 20 L.Ed. 2d 1001; *Standard Radio and Television Co. v. Chronicle Publishing Co.* (1960), 182 Cal. App. 2d 293, 6 Cal. Rptr. 246). (Italics supplied).

In an unreported case in Phoenix, Arizona,[19] involving a complaint of interference by a CB operator to television reception in violation of a residential restriction against unsightly antennas, a jury awarded $18,000.00 compensatory damages and $30,000.00 punitive damages and assessed court costs and plaintiff's attorney's fees against the CB operator. Even though the award of damages was set aside by the trial judge, in excess of $10,000.00 in attorney's fees and court costs remained. Unable to finance an appeal or pay the assessed fees and costs, the CB operator filed for bankruptcy.

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[18]*Schroeder v. Municipal Court of Los Cerritos Judicial District*, 73 Cal. App. 3rd 841, 141 Cal. Rptr. 85.

[19]*Avenida Hermosa Townhouse Association No. 2, Glenn A. Brockman, Rover E. Ryan and Gloria Ryan v. Harry S. Redecker, Jr.*, Superior Court of Arizona, County of Maricopa, Case No. C-303, 393.

In a somewhat similar case in Las Vegas, Nevada, an action for damages for causing interference to television reception was brought against an individual who was both a licensed amateur operator and a licensed CB operator.[20] A motion to dismiss the complaint for lack of jurisdiction because of federal preemption was denied. After the expenditure of several thousand dollars by the defendant and the filing of a counter-complaint alleging malicious prosecution, the plaintiffs dismissed. The counterclaim remains for trial.

Typical of cases pending in several states is an action for damages based upon allegations of interference to television reception and hi-fi equipment by the operation of an amateur radio station in Springfield, New Jersey.[21] Pretrial conferences have not been concluded.

The number of actions against amateur and CB operators based upon interference will increase until the Court rules that the supremacy clause, Article VI, Section 2, of the United States Constitution, is controlling. In a news release accompanying a report of the FCC's Field Operations Bureau released in October, 1977, the following estimates of interference complaints were given:

> In Fiscal Year 1976, a lower bound on the number of individuals experiencing interference to TV reception associated with the operation of CB stations probably lies somewhere between one and ten million, with the best estimate being *four million* persons. Projections for Fiscal Year 1979 are that between 3-21 million persons (best

[20] *Frank Anthony Joy and Denna Lynn Joy v. Clarence R. Wilson and Betty L. Wilson.* Eighth Judicial Court of Nevada, County of Clark, Department VI, Case No. A-159, 672.

[21] *Charles Gerst and Margaret Gerst v. Donald Jellinek.* Superior Court of New Jersey, Chancery Division, Union County, No. AL 9753-4 (filed June 28, 1977).

> estimate — *9 million*) will experience TVI associated with CB radio operation. (Italics supplied).[22]

The number of actual complaints to the FCC is considerably less. In remarks in support of legislation to require manufacturers of television receivers and other home entertainment devices to incorporate adequate filtering and shielding in their products, Senator Barry Goldwater, an active amateur, said on March 2, 1977:

> FCC field offices actually received over 100,000 complaints last year and, based upon the ever-expanding number of complaints it is currently receiving, projects that over 200,000 will come in during fiscal year 1978.[23]

Even though the figures are for interference almost entirely from CB operations, the similarity between CB and amateur installations makes most restrictive ordinances and court opinions equally applicable to both services.

Interference to television reception is a federal, not a local, problem. Even though most of the complaints result from operation of CB stations, operation of transmitters in other radio services — broadcast, police, taxicab, industrial and business, to name a few — can cause such interference. A solution cannot be found in local legislation.

A ruling by the Court on federal preemption in cases of alleged and actual interference to radio and television reception by amateur and CB radio stations is necessary to (1) provide much needed uniformity among the Courts of the several states, (2) resolve the substantial conflict now existing between the state courts, and (3) provide guidelines

[22] Report FCC/FOB/PD&E 77-02.

[23] 123 Congressional Record, No. 36.

to the hundred or more municipalities now considering some form of regulation restricting amateur radio and CB operators.

CONCLUSION

The regulation and licensing of all radio stations, including amateur and CB, are the responsibility of the Federal Communications Commission. Nevertheless, local authorities continue to invade the field by the adoption and enforcement of zoning ordinances and related application procedures which so limit the height and size of outdoor antennas in residential areas as to substantially restrict the effective operation of the amateur stations.

Many such ordinances have been adopted in an effort to reduce or eliminate interference to television reception, even though the field has been preempted by the federal government. Numerous challenges to the legality of the ordinances are pending throughout the United States.

In addition, private actions brought under a variety of theories are pending in many states as the result of interference, usually from amateur and CB stations to television reception. Federal preemption is a threshhold question in many such actions.

Consideration of these questions by the Supreme Court of the United States is essential to prevent further invasion by local authorities into a field preempted by the federal government, and to bring about uniformity of decisions of courts of all fifty states.

The public interest will be served by assumption of jurisdiction.

Respectfully submitted,

THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED

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APPENDIX
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We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above amicus curiae brief may be filed in this proceeding with the Supreme Court of the United States.

DATED: 1/31/78

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THOMAS F. WINFIELD, City Attorney
EBBEN, BROWN, WINFIELD AND CANZONERI

By /s/ Thomas F. Winfield
THOMAS F. WINFIELD
On Behal of the CITY OF CERRITOS
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DATED: 2-7-78

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CERTIFICATE OF SERVICE

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